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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1929.

No. 254.

NEW JERSEY BELL TELEPHONE COMPANY,
Appellant,

vs.

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
Appellee.

On Appeal From the Court of Errors and Appeals of New Jersey.

REPLY BRIEF FOR APPELLANT

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I.

We did not argue in our original brief, as the State's brief seems to imply in the discussion on pages 2 and 3, that this court can hold this tax invalid under the state constitution. We recognize that the decision of the state court upholding the validity of the statute and tax, in this case, forecloses, in this court, any question that might arise under the state constitution.

Our argument was that this court will determine for itself the nature and incidence of the tax, and will examine the state decisions for whatever light they may throw upon the matter. We pointed out that in a succession of many decisions handed down over a period of some twenty-five years, and not departed from until the decision in this case, the highest court of the state had held consistently that this and precisely similar taxes are license taxes, and as one of the grounds of decision had held that if the tax were a property tax it would vio-

late the state constitution. Our suggestion was, and is, that the fact that the state court has so held should have weight in the minds of this court in support of our contention that this is not a property tax.

II.

The State's brief, page 1, calls attention to the fact that appellant's business is conducted entirely within the State of New Jersey, and the point is discussed in the brief on page 11, where it is pointed out that the gross receipts "contain nothing for the transmission of messages over lines outside of the state". This is true. We so stated in our original brief. It is also true that of the entire taxable gross receipts for the year here involved, amounting to $21,000,000, the portion derived from interstate business is approximately $5,000,000. There is no issue about this. The facts are stipulated and are shown on page 24 of the record. The fact that the business of appellant in interstate commerce is all done within the State of New Jersey is entirely without significance.

III.

The State's brief seeks to sustain this tax upon the assertion that it is exacted by the state in consideration of four rights or benefits which appellant receives from the state (enumerated and discussed on pp. 8 to 10 of appellee's brief) namely (1) the right of eminent domain, (2) the right to occupy the streets with its poles, wires, etc., (3) the benefit of being a regulated monopoly and

(4) the element of "going concern value". Appellee's brief says at page 10:

> "All of these four rights and benefits are bestowed by the state upon appellant solely in consideration of the taxes sought to be imposed by this act."

If the statement just quoted means nothing more than to say that the rights and privileges which a corporation has are derived from the laws of the state of incorporation, and that all taxes by the state are to be deemed compensation to the state for these rights and privileges, we may, for the purposes of this case, concede it; nevertheless, the state must proceed within the limits of the provisions of the federal constitution and must exercise its admitted powers of taxation in a lawful manner.

But if the contention of appellee is, as we understand it to be, that the gross receipts tax here in question is levied in consideration of the four enumerated rights or benefits, we find no basis whatever to support it. It is pure speculation of counsel for the state. We submit that counsel may not thus speculate as to what the legislature intended or might have intended. It is not sufficient, in order to sustain a tax exacted of a corporation, to say that the tax is not greater than the value of some right or privilege enjoyed by the corporation at the hands of the state. The question is not what the right to condemn private property, to occupy the public streets, to be a regulated monopoly, or to function as a going concern, are worth to this company, or whether they are worth the amount of this tax, a million dollars a year. We may concede that these rights, being indispensable, are worth whatever price the state may see fit to charge for them.

There are two conclusive answers to the contention thus made by counsel for the state. The first we have already suggested, namely, that it does not appear, except by the assertion of counsel, that this tax was laid for or on account of these four rights or privileges. Counsel may not, and this court will not, speculate as to what amount or manner of tax the legislature of New Jersey might have imposed as compensation for such rights, if it had addressed itself to that problem. The second answer is that the tax, if laid for the exercise of these several rights and privileges, since it takes the form of a fixed percentage laid upon the gross receipts from the interstate commerce, is violative of the Commerce Clause, and hence beyond the state's power.

IV.

Finally, the State in its brief (pp. 17 *et seq.*) points to the fact that different classes of property have been traditionally taxed by different methods, that there is no principle of law requiring an *ad valorem* basis for a tax, and that a tax measured by a percentage of gross receipts has long been a familiar and valid form of taxation. All of this is true, of course. The State may take a fixed percentage of gross receipts in lieu of taking a fixed percentage of the value of the property taxed, provided that, if interstate receipts be included, the one *tax* shall be equivalent to the other. The *rationale of the rule is that gross receipts are an index of the value of the property which produces them.* But where the reason of the rule fails the rule has no application. The State asserts that the gross receipts of this company are an index or measure of the value of the right to use the highways. This is simply untrue. The two things

are wholly unrelated. The gross receipts throw no more light on the value of the right to use the highways, separately considered, than they do on the value of the switchboards, or of any other indispensable part of the telephone property, separately considered. The State's brief points to our admission that without the right to use the highways the value of the entire property would be nothing. But that is equally true of the switchboards alone, or of the telephones alone. Yet no one would contend that the value of a fragment of the physical property, such as the switchboards, or the telephone buildings, or the lines, either in or off the streets, could be measured by the gross receipts from the entire property, for purposes of taxation, and taxed at a fixed rate of such gross receipts in lieu of other property taxes. The same is true as to the property right in question, the right to use the highways. There is no distinction.

Where interstate commerce is involved, the State may not use an arbitrary basis as the measure of a tax that is levied in lieu of the ordinary property tax. It is not arbitrary to use the gross receipts derived from the entire property as an index or measure of a tax upon the entire property, because there is a measurable relationship between the property values and earnings. There is no such relationship between the measure here employed and the thing taxed, and the tax is, therefore, purely arbitrary.

Respectfully submitted,

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